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No. 82-1047

IN THE
SUPREME COURT OF
THE UNITED STATES

October Term, 1982

UNITED STATES OF AMERICA,

Petitioner,

v.

ONE ASSORTMENT OF 89 FIREARMS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE JEROME N. FRANK LEGAL SERVICES ORGANIZATION OF THE YALE LAW SCHOOL AS AMICUS CURIAE IN SUPPORT OF CLAIMANT/RESPONDENT

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QUESTION PRESENTED

Is an *in rem* forfeiture predicated upon the use of property in a criminal offense punishment within the meaning of the Fifth Amendment, such that the forfeiture is barred by the prior acquittal of the owner on the underlying criminal charge?

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INTEREST OF THE AMICUS CURIAE

The Jerome N. Frank Legal Services Organization (LSO) is the clinical legal education program of the Yale

Law School. Through its participating students and supervising faculty, LSO provides legal assistance to certain categories of individuals who could not otherwise obtain quality legal services, including federal and state prisoners, children, aliens and mental patients. LSO's project at F.C.I. Danbury has counselled over 3000 federal prisoners since its founding in 1970, making it one of the most experienced programs of legal assistance to federal prisoners in the country. Scores of those prisoners have had legal difficulties under the federal forfeiture laws, and students and faculty at LSO have represented several inmates in federal district and appellate courts in Connecticut and New York, and have counselled clients with forfeiture-related problems in other federal districts.

LSO now represents the Petitioner in a case raising issues closely

related to those presented by the instant case. That case, Aponte v. United States, is now pending before this Court on a Petition for a Writ of Certiorari.1/ Also, LSO has appeared before this Court, both as counsel,2/

1/ Aponte v. United States, No. 82-5857, petition filed Dec. 7, 1982. Counsel understands that the Petition in this case was submitted to the Conference on March 18, 1983, and may be being held pending the disposition of the instant case. Although both Aponte and 89 Firearms require the characterization of a federal forfeiture penalty as criminal or civil in nature, the challenge in Aponte is to the constitutionality under the Due Process Clause of 21 U.S.C. §881(d) and 19 U.S.C. §1615, which shift the burden of proof from the Government and onto the claimant to seized property. Under § 924(d), the burden of proof by a preponderance of the evidence rests with the Government. See Gov't Br. at 4-5, 22-23. Thus, the statutory construction of 18 U.S.C. §924(d) in this case, for the purposes of the Double Jeopardy Clause, will not fully dispose of the Aponte case.

2/ Connecticut Board of Pardons v. Dumschat, No. 79-1997, 452 U.S. 458 (1980).

and as amicus,3/ in other cases involving prisoners' rights. The law school faculty who supervise students in LSO also have worked on other cases before this Court.4/

In keeping with its role as representative of the individuals who suffer forfeitures, and in keeping with its academic mission,5/ LSO's purpose in filing this amicus brief is to present facts and legal principles necessary to this Court's full consideration of the nature and implications of the federal

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3/ See, e.g., Weinstein v. Bradford, No. 74-1287, 423 U.S. 147 (1975).

4/ See, e.g., . TIAA-CREF v. Spirt, No. 82-791; Norris v. Arizona, No. 82-52; Peters v. TIAA-CREF, No. 82-794; St. Paul Fire & Marine Ins. v. Barry, No. 77-240, 438 U.S. 531 (1978).

5/ For example, LSO faculty and students have prepared Congressional testimony and several scholarly papers concerning the federal forfeiture laws, including a student Note scheduled to appear in a forthcoming issue of The Yale Law Journal.

forfeiture statutes.

Both parties have consented to the filing of this amicus brief.

STATUTE INVOLVED

Section 924(d) of Title 18 provides:

> Any firearms or ammunition involved in or used or intended to be used in, any violation of the provisions of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter.

SUMMARY OF ARGUMENT

The Court of Appeals for the Fourth Circuit, sitting en banc, held in this case that a punitive forfeiture under 18 U.S.C. § 924(d) is precluded by a prior acquittal of the owner on the underlying criminal charge. That ruling is required by the Double Jeopardy

Clause and supported by a long line of decisions in this Court.

The prohibition of the Double Jeopardy Clause is triggered whenever someone is twice put in jeopardy of punishment;6/ whether forfeitures under 18 U.S.C. § 924 (d) are precluded following a criminal acquittal thus depends upon whether the forfeiture is punishment.7/ As a genre, however, forfeitures serve many purposes. Like fines, forfeitures can be used either to further the remedial goals of government or to vindicate the punitive policies of the criminal law.

Thus, unlike infamous punishments,8/ forfeitures are not classified

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6/ See, e.g., Breed v. Jones, 421 U.S. 519, 528-29 (1975).

7/ Compare Coffey v. United States, 116 U.S. 436, 443 (1885), with Helvering v. Mitchell, 303 U.S. 391, 398-399 (1937).

8/ See, e.g., Wong Wing v. United States, 163 U.S. 228 (1896).

as criminal penalties on the basis of their inherent nature. Rather, they are classified according to the purpose that they serve in a given case.9/ Consequently, it is only by analyzing the punitive versus remedial goals of Congress and the effect of the statute that the legal nature of the sanction may be discerned.10/

This dependent nature of forfeitures means that forfeitures are uniquely susceptible to misuse as essentially criminal sanctions under the guise of civil remedies. It is for this reason that in cases where forfeitures and other penalties are enforced in civil proceedings, this Court has inquired not only into the manifest

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9/ Helvering v. Mitchell, 303 U.S. 391, 399-401 (1937).

10/ See, e.g., United States v. Ward, 448 U.S. 242, 248 (1980); United States v. Constantine, 296 U.S. 280, 294 (1935).

legislative intent in labeling the sanction, but also into the underlying purpose and the effect of the sanction.11/ Whether or not the purpose and effect of the sanction is punitive depends largely upon whether or not the penalty is imposed upon someone as a consequence of his own, knowingly committed criminal acts.12/

Once identified as punitive or remedial, the functional, legal nature of the forfeiture will dictate whether the constitutional provisions restricting the imposition of criminal punishment are applicable. The rule of Coffey v. United States, 116 U.S. 436,

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11/ See, e.g., United States v. Ward, supra; Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1962); United States v. Constantine, supra.

12/ E.g., United States v. United States Coin and Currency, 401 U.S. 715, 718 (1971); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700 (1965); Boyd v. United States, 116 U.S. 616, 637 (1885).

443 (1885), as endorsed and refined by almost a century of judicial interpretation,13/ is clear: a punitive forfeiture occasioned by criminal misconduct is barred by an acquittal on the underlying criminal offense.

In this case, the Court of Appeals recognized the punitive function of forfeitures under 18 U.S.C. § 924(d) and applied the rule of Coffey. That result is inescapable under the test set forth by this Court for the classification of a penalty as essentially crimi-

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13/ See, e.g., One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 235-236 (1972); Helvering v. Mitchell, 303 U.S. 391, 398, 405-406 (1937); United States v. LaFranca, 282 U.S. 568, 573 (1930); Murphy v. United States, 272 U.S. 630, 632 (1926); Stone v. United States, 167 U.S. 178, 187 (1896); Boyd v. United States, 116 U.S. 616, 634 (1885). See also United States v. Chouteau, 102 U.S. 603 (1880); United States v. Ulrici, 102 U.S. 612 (1880); United States v. McKee, 26 Fed. Cas. 1116 (4 Dill. 128) (Circuit Court, E.D. Mo. 1877). See also cases cited at 27 ALR2d 1137, 1140-41.

nal or civil in United States v. Ward, 448 U.S. 242, 248-49 (1980).

First, the legislative history of section 924(d) forfeitures reveals that the manifest legislative intent in creating 18 U.S.C. § 924(d) was to punish and deter offenses against the criminal law.14/ Moreover, Congress's intent in 18 U.S.C. § 924(d) was to punish by forfeiture only those persons found guilty of the underlying criminal offense; forfeiture following acquittal does not appear to be authorized by the statute.15/

Second, according to the list of factors enumerated by this Court in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1962), and adopted in Ward,

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14/ See Pub. L. No. 90-618, Section 101; H.R. 1577, 90th Cong., 2d Sess. reported in [1968] U.S. Code Congressional and Administrative News, 4410, 4412-13; S.R. 1501, 90th Cong., 2d Sess. (1968).

15/ See footnote 14, supra.

the purpose and effect of forfeiture under 18 U.S.C. § 924(d) is to punish criminal wrongdoing. This punitive goal of the statute is evidenced primarily by the fact that forfeiture under §924(d) is predicated not only upon criminal conduct, but also upon the 'bad intent' which is a requisite for all punishment.

Specifically, 18 U.S.C. § 924(d) is designed to punish only those persons who -- along with their property -- are 'significantly involved in criminal enterprise.' By authorizing remission and mitigation of forfeiture for persons who are innocent of the underlying offense,16/ the statute implicitly contains a requirement of scienter in justification of forfeiture. Congress thus singled out for the penalty of forfeiture only those persons

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16/ United States v. United States Coin and Currency, 401 U.S. 715, 722 (1971).

who are actively guilty of criminal wrongdoing. That selection shows that the sanction is punishment.

The other Mendoza-Martinez tests confirm this conclusion. For example, forfeitures traditionally have served as punishment, 17/ and forfeiture under § 924(d) is an affirmative disability in that it involves a governmental taking of private property, and not just the revocation of a benefit granted as a matter of governmental largesse. 18/ Forfeitures under § 924(d) also promote the traditional aims of punishment -- retribution and deterrence. 19/

Finally, there is no distinct alternative purpose for these forfeitures other than punishment for cri-

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17/ O. Holmes, The Common Law, Lecture 1 at 10, 34 (1881); W. Blackstone, Commentaries, *375.

18/ Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1962).

19/ See footnote 14, supra.

minal wrongdoing. The argument that the forfeiture is preventative in that it keeps dangerous firearms out of the stream of illegal commerce assumes that the owner of the firearms would sell them illegally but for the forfeiture -- despite the fact of acquittal on the charge of illegal sale. This purportedly preventative goal thus collapses into incapacitation with respect to criminal behavior, and, therefore, is not distinct from the goals of punishment.20/

In sum, both the legislative history of forfeiture under 18 U.S.C. § 924(d) and the purpose and effect of the sanction repeatedly invoke the spectre of criminal guilt. The forfeiture thus constitutes punishment within the meaning of the Fifth Amendment, and,

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20/ See H.L. Packer, The Limits of Criminal Sanction (1968) at 48-53.

under Coffey, may not be visited upon an individual in a civil proceeding following his acquittal on the underlying criminal charges.

ARGUMENT

I. FORFEITURE PROCEEDINGS ARE PRECLUDED WHENEVER THE FORFEITURE WOULD CONSTITUTE A SECOND PUNISHMENT FOR THE UNDERLYING CRIMINAL CONDUCT.

The Double Jeopardy Clause provides that no one "shall for the same offense be twice put in jeopardy of life or limb." In application, the Clause has come to mean that no one may twice be punished -- or twice be put in jeopardy of punishment -- for the same offense. Breed v. Jones, 421 U.S. 519, 528-29 (1975).

This principle was invoked by this Court with respect to forfeitures predicated upon criminal misconduct in Coffey v. United States, 116 U.S. 436 (1885), the case primarily relied upon

by the Fourth Circuit in this case. In Coffey this Court observed:

> There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil [forfeiture] suit amounts to substantially the same thing . . . [T]he facts cannot be again litigated between [the parties], as the basis of any statutory punishment.

Id. at 443 (emphasis supplied).21/

Coffey involved a forfeiture which Congress had listed right along-

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21/ Although Coffey defined the rule in terms of preclusion and collateral estoppel, the opinion relied heavily on United States v. McKee, 26 Fed. Cas. 1116 (4 Dill. 128) (No. 15,688) (Circuit Court E.D. Mo. 1877), which clearly was decided on grounds of double jeopardy (see discussion, infra, pp. 17-18). 116 U.S. at 445. Moreover, this Court has squarely held that the rule of collateral estoppel in federal criminal law is embodied in the Fifth Amendment guarantee against double jeopardy. Ashe v. Swenson, 397 U.S. 436, 445-46 (1969). Indeed, Ashe cited Coffey for the rule of collateral estoppel in federal criminal law, id., at 443 n.7, thus indicating retrospectively that the decision in Coffey would be required under the Double Jeopardy Clause.

side fine and imprisonment as a punishment for criminal behavior. 116 U.S. at 437. The statute authorizing forfeiture in the instant case, 18 U.S.C. § 924, is structured in precisely the same way, demonstrating that the forfeiture is simply an additional statutory punishment for conduct already defined to be a crime.22/

The Government has acknowledged that the real "bone of contention" in this case is this characterization of forfeiture under 18 U.S.C. § 924(d) as punitive for the purpose of applying the rule of Coffey. (Gov't Br. at 10.) The Government also has asserted, however, that Coffey is the "single aged precedent" upon which the Fourth Circuit based its entire holding in this case, and has attempted to discredit the rule of that seminal precedent. (Gov't Br.

22/ See discussion infra at pp. 37-39.

at 11-13.) A review of the cases both before and after Coffey reveals, however, that this Court frequently has reaffirmed the rule of Coffey that forfeitures and penalties which serve punitive purposes must be treated as criminal sanctions which entail jeopardy of punishment.

For example, Coffey was presaged at the Circuit Court level in 1877 by United States v. McKee, 26 Fed. Cas. 1116 (4 Dill. 128) (No. 15,688) (Circuit Court, E.D. Mo. 1877), and in the Supreme Court by United States v. Chouteau, 102 U.S. 603 (1880), and United States v. Ulrici, 102 U.S. 612 (1880). In McKee, Justice Miller, riding Circuit, noted that the government's suit seeking a penalty of double the amount of taxes due on distilled spirits -- following acquittal on criminal charges for the same acts -- was

prohibited as an attempt to punish twice for the same crime. Id. at 129-130.

Similarly, this Court ruled in Chouteau and Ulrici that a purportedly civil penalty for violation of federal tax law was precluded by the Government's prior settlement with the defendant for the offense charged. Given that the civil action and the criminal prosecution followed upon the same criminal transactions, the Court in Chouteau held that the monetary penalty prescribed for the offense was intended as part punishment for it. 102 U.S. at 610. Therefore:

> [The defendant] has been punished in the amount paid upon the settlement for the offence with which he was charged, and that should end the present action, according to the principle on which a former acquittal or conviction may be invoked to protect against a second punishment for the same offence. To hold otherwise would be to sacrifice a great principle to the mere form of procedure ...

Id. at 611 (emphasis supplied).

The cases following Coffey also illustrate this Court's adherence to the rule that punitive sanctions cannot hide behind civil labels of convenience in contravention of constitutional principles. For example, Boyd v. United States, 116 U.S. 616 (1885), like both Coffey and the instant case, involved a forfeiture which was prescribed by statute, along with fine and imprisonment, as a penalty for a criminal offense. Id. at 617. The issue before the Court was whether the claimant to the seized property could invoke the Fourth and Fifth Amendment protections against unreasonable search and seizure and compulsory self-incrimination. Central to the Court's reasoning in support of the claimant's position was the Court's conclusion that:

> . . . proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they be civil in form, are in their nature, criminal.

Id. at 634 (emphasis supplied). See also Lees v. United States, 150 U.S. 476, 480 (1893) (applying Boyd because civil proceeding to collect punitive monetary penalty for the importation of aliens in violation of federal statutory prohibition "unquestionably criminal in its nature").23/

23/ Although not all of the declarations of Boyd have "stood the test of time," Fisher v. United States, 425 U.S. 391, 407 (1976), the conclusion that forfeitures incurred by reason of the commission of criminal offenses "are in their nature criminal" has survived -- the Government's statement to the contrary notwithstanding. Compare Fisher, 425 U.S. at 407-408, with Gov't Br. at 38. That rule also has been reinforced by other recent cases. See, e.g., United States v. United States Coin and Currency, 401 U.S. 715, 718 (1971) (monetary forfeitures occasioned by criminal offenses indistinguishable from criminal fines); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 697-98, 700 (1965) (emphasizing "authoritative statement" and "continuing validity" of Boyd holding that such forfeitures are criminal in nature). Indeed, even One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232 (1972), a case

(Footnote continued)

The Court returned to the double jeopardy question in Stone v. United States, 167 U.S. 178 (1896). In that case, the Court carefully distinguished "property...forfeited to the United States on account of the violation of certain [criminal] statutes," id. at 184 (emphasis in original), from a fine "for the value of property wrongfully converted by the defendant." Id. at 187. This distinction between punitive sanctions and remedial damages is one which later became firmly ensconced in American jurisprudence in Helvering v. Mitchell, 303 U.S. 391 (1937), and which forms the basis of the test for classifying penalties recently set forth in

(Footnote continued)

heavily relied on by the Government in this case (e.g., Gov't Br. at 14-15, 41), acknowledges that the difference between forfeitures as civil sanctions and forfeitures as criminal penalties depends upon whether or not the forfeiture is predicated upon criminal wrongdoing. Id. at 236 n. 6.

United States v. Ward, 448 U.S. 242, 248-249 (1980).

The Government thus has glided over the most important element in this case, the nature of the conduct for which the forfeiture is imposed. The decisions of this Court emphasize that the characterization of a forfeiture penalty as "criminal" or "civil" is largely determined by the classification of the conduct which justifies the penalty as criminal or not. 24/ It is for this reason that this Court has emphasized the importance of personal cul-

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24/ See, e.g., One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 236 n.6 (1972); United States v. United States Coin & Currency, 401 U.S. 715, 718 (1971); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700 (1965); United States v. Constantine, 296 U.S. 287, 294 (1935); United States v. LaFranca, 282 U.S. 568, 575 (1930); Lipke v. Lederer, 259 U.S. 557, 562 (1922); Stone v. United States, 167 U.S. 178, 187 (1896); Boyd v. United States, 116 U.S. 616, 637 (1885); Coffey v. United States, 116 U.S. 436, 442-43 (1885).

pability in distinguishing punitive from remedial sanctions.25/

In making this careful distinction, the Court in Stone reaffirmed the correctness of the Coffey decision, emphasizing that:

> The proceeding by libel against Coffey, although civil in form was penal in its nature, because it sought to have an adjudication of the forfeiture of his property for acts prohibited. It was, as we have seen, a case in which a punishment, denounced by statute, was sought to be inflicted as a consequence of the existence of facts that were in issue and had been finally determined against the United States in a criminal proceeding.

25/ United States v. United States Coin and Currency, 401 U.S. 715, 722 (1971) (forfeitures are punishment when "they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise"); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1962) (the characterization of a sanction as punitive depends, among other things, upon whether the sanction "comes into play only on a finding of scienter", and "whether the behavior to which it applies is already a crime").

Id. at 187 (emphasis supplied).26/

The Court in Stone also acknowledged that when a sanction pursued by the Government is punishment and not damages, the rule is that:

> The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of the proceeding, and are the basis of this one [for forfeiture], and which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist.

Id. at 186, quoting, Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246 (1818).27/ This is

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26/ Although the Court finally determined that the sanction in Stone was not punishment, Coffey was not weakened by this distinction. In a later case, ultimately decided under Philippine local law rather than constitutional principles, the Court noted that the punitive character of the civil action at issue would "bring it under the principles of Coffey . . . rather than Stone." Chantangco v. Abaroa, 218 U.S. 476, 483 (1910).

27/ The Solicitor General points to the Stone case for the proposition that

(Footnote continued)

not to say that the judgment of a court can, in a metaphysical sense, establish as a matter of fact that past incidents either did or did not occur. (But cf. Gov't Br. at 9.) Rather, the rule is that society accepts the judgment in a court of law as a conclusive statement of the facts which we will henceforth

(Footnote continued)

that when the burden of proof differs as between a criminal and a civil proceeding, "'the judgment in the criminal case does not make the issues in the present [civil] case res judicata,'" (Gov't. Br. at 15, quoting Stone at 188). The point made by the Stone case, however, is that the difference in the burden of proof as between two proceedings is only relevant given the prior determination that the first is criminal while the second is not. When both involve the imposition of punishment, as was the case in Coffey and as is true in this case, "[t]he judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or, as evidence, conclusive . . ." Stone at 186, quoting Coffey, 116 U.S. at 445. Properly analyzed, Stone thus supports Respondent, not the Government. See also One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 235 (1972); Murphy v. United States, 272 U.S. 630, 632 (1926).

use to guide our behavior toward the parties involved. When this behavior entails the imposition of punishment in both a criminal trial and a punitive forfeiture proceeding, the judgment of the former is conclusive for the purpose of the latter.

The case of Murphy v. United States, 272 U.S. 630 (1926), is to the same effect. The Court in Murphy recognized that if the suit for the abatement of the nuisance of a distillery was indeed a punishment for violation of Prohibition, then a prior acquittal on criminal charges would bar the action. Id. at 632. The Court concluded, however, that the abatement was not punishment, but regulation.28/

28/ As support for its conclusion, the Court noted that defendant could avoid the closing of his property by simply posting a bond conditioned against its illegal use. 272 U.S. at 632. Here, by contrast, the seizure, forfeiture, and destruction of Respondent's firearms constitutes

(Footnote continued)

United States v. LaFranca, 282 U.S. 568 (1930), also underscores the importance of close judicial scrutiny of burdens imposed upon individuals at the hands of Government. In that case, the Court held that a civil proceeding to collect a tax for the illegal sale of liquor was precluded by a prior criminal conviction, because the monetary fine purported by Congress to be a tax was in fact imposed for the purpose of punishment. Id. at 572. The fact that the penalty was recoverable in a civil proceeding was irrelevant:

(Footnote continued)

> a permanent deprivation of his property and, possibly, liberty as well. (See Amendment III, U.S. Constitution.) Although the Government asserts that the purpose of the forfeiture is to guarantee that these firearms will not be sold in unregulated channels (Gov't Br. at 33), the forfeiture without the alternative of a bond to ensure the desired licensing shows that the sanction is primarily designed to punish Respondent. See discussion, infra, at 59-60.

> But an action to recover a penalty for an act declared to be a crime is, in its nature, a punitive proceeding, although it takes the form of a civil action; and the word "prosecution" is not inapt to describe such an action.

Id. at 575.29/

Still another case to look beyond the label applied by Congress to the substance of a monetary exaction was United States v. Constantine, 296 U.S. 280 (1935). There, again, an ostensible tax on the sale of liquor was found unconstitutional as a penalty in disguise, which should have fallen with the repeal of the Eighteenth Amendment. The Court noted in its analysis that if the purpose of the statute was "to punish

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29/ LaFranca was decided under a federal statute which only addressed the effect of conviction upon subsequent prosecution. Willis-Campbell Act, c. 134, 42 Stat. 222, 223 (U.S.C. Title 27, §3), quoted at 282 U.S. 571. In a case of acquittal, Coffey would have barred the civil proceeding, given the Court's unequivocal statement that the tax at issue was in reality punishment. Id. at 572. Cf. Gov't Br. at 13.

rather than to tax," then what is "in reality a penalty . . . cannot be converted into a tax by so naming it." Id. at 294.30/

In the instant case as well, the character of forfeiture under 18 U.S.C. § 924(d) as punishment is not diluted by the denomination of the penalty as a forfeiture, or by the provision of civil proceedings for its enforcement.

Helvering v. Mitchell, 303 U.S. 391 (1938), was the watershed case of this era, and it, too, followed the course laid out by Coffey. In that case the Court noted:

> That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the

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30/ See also Lipke v. Lederer, 259 U.S. 557, 562 (1922)(ostensible tax on liquor "clearly involves the idea of punishment for infraction of the law -- the definite function of a penalty"); Regal Drug Corp. v. Wardell, 260 U.S. 386 (1922) (same).

> criminal proceeding was based has long been settled. . . .
>
> Where the objective of the subsequent action likewise is punishment, [however], the acquittal is a bar, because to entertain the second proceeding for punishment would subject the defendant to double jeopardy; and double jeopardy is precluded by the Fifth Amendment whether the verdict was an acquittal or a conviction.

Id. at 397-98 (emphasis supplied).

Thus, the Double Jeopardy Clause is always applicable if the sanction "was intended as punishment, so that the proceeding is essentially criminal". Helvering v. Mitchell, 391 at 398-99. It is only when the second action is instituted for remedial purposes that the oft-cited statement that "Congress may impose both a criminal and a civil sanction in respect of the same act or omission," id. at 399, becomes

relevant.31/

In United States ex rel. Marcus v. Hess, 312 U.S. 537 (1943), the principle of Coffey was again implicitly reaffirmed through adherence to Helvering's punitive/remedial distinction:

31/ In Helvering v. Mitchell, the sanction at issue was a revenue measure designed to protect the Government's financial interests by providing that a penalty in the amount of 50% of a tax deficiency would be assessed if any part of the deficiency was due to fraud with intent to evade tax. The Court made clear that sanctions imposed to discourage fraudulent attempts to evade the tax "may confessedly be either criminal or civil," 391 U.S. at 399. The Court noted, however, that additions to tax "are provided as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud ... 'It must therefore be considered remedial as providing indemnity for loss.'" Id. at 401, quoting, Stockwell v. United States, 80 U.S. (13 Wall.) 531 (1871). This case, by contrast, does not involve the revenue, and Respondent has done nothing to endanger the Government fisc. The Government's interest in this case derives from its police power, and the forfeiture is thus punishment. See discussion, infra, at pp. 52-54.

> Helvering . . . emphasized the line between civil, remedial actions brought primarily to protect the government from financial loss and actions intended to authorize criminal punishment to vindicate public justice. Only the latter subject the defendant to "jeopardy" within the constitutional meaning.

Id. at 548-49. See also Rex Trailer Co. Inc. v. United States, 350 U.S. 148, 150-151 (1956).

This characterization of Helvering, made six years after the case was decided, illustrates the mistake made by the Solicitor General in relying on Helvering for the proposition that the type of procedural rule invoked takes precedence over the classification of the sanction for constitutional analysis. (Gov't Br. at 38-39.)

In Helvering, Justice Brandeis rejected this sort of procedural analysis and announced a new rule to govern the characterization of a penalty:

> The distinction here taken between sanctions that are

> remedial and those that are punitive has not generally been specifically enunciated... the [prior] cases have usually attempted to distinguish between the type of procedural rule involved, rather than the kind of sanction being enforced."

303 U.S. at 400 n.3 (1937) (emphasis supplied). Thus, under Helvering, proceedings for penalties which are "in their nature criminal," (Boyd, 116 U.S. at 634), are precluded by a prior acquittal as attempts to punish a second time, simply by virtue of their nature as punishment. Id. at 399, 405-405.32/ The Government's attempt to resurrect a pre-Helvering analysis should be rejected.

In sum, Respondent's claim and the en banc decision of the Court of

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32/ Punishment is a trigger for many constitutional procedural guarantees, from the Fourth and Fifth Amendment protections against unreasonable search and seizure and against compulsory self-incrimination, Boyd, 116 U.S. at 637, to the locus and magnitude of the burden of proof. Mullaney v. Wilbur, 421 U.S. 684 (1974); In re Winship, 397 U.S. 358 (1969).

Appeals derive sustenance from much more than "a single aged precedent -- Coffey." (Gov't Br. at 11.) The foregoing review illustrates that history is replete with instances of judicial scrutiny of legislative purpose to determine whether legislative enactments are punitive in nature. When the purpose is punishment, the rule of Coffey applies.

Indeed, only the issue of punishment is of sufficient constitutional moment to induce the courts to investigate legislative purpose at all; in other areas, the motives and intentions of Congress invariably are beyond the scope of judicial review. See United States v. O'Brien, 391 U.S. 367, 383 n.30 (1968). The real base of authority for Coffey, then, is thus the historic judicial function to safeguard constitutional rights from the encroachment of Government power.

II. FORFEITURE UNDER 18 U.S.C. § 924(d) IS A PUNITIVE SANCTION DESIGNED TO PUNISH CRIMINAL WRONGDOING.

Given that, under Coffey and its progeny, the Double Jeopardy Clause bars a punitive forfeiture following the owner's criminal acquittal, the task for the Court in this case is to determine whether forfeiture under 18 U.S.C. § 924(d) is a punitive or a remedial sanction. With this the Government agrees (Gov't Br. at 10, 17).

In United States v. Ward, 448 U.S. 242 (1980), this Court prescribed a two-pronged test for distinguishing criminal from civil penalties:

> First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. . . . Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.

Id. at 248-249 (citations omitted).

The major factors to be evaluated in making such an analysis of

"purpose" and "effect" were first enumerated by this Court in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1962):

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment -- retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

Id. at 168-69 (footnotes omitted).

Applying the Ward analysis to forfeitures of firearms under 18 U.S.C. § 924(d), it appears that Congress's goal in providing for forfeitures along with fines and imprisonment was to deter and punish those who traffick illegally in firearms. Even if Congress did not specifically so intend, however, the purpose and effect of the statute under the Mendoza-Martinez indicia mark this forfeiture sanction as punishment.

A. Congress Intended Forfeiture to be an Additional Penalty for Violation of the Gun Control Act.

The first prong of the Ward test requires an investigation into the express or implied preference of Congress for a criminal or civil label in authorizing a sanction. With respect to 18 U.S.C. § 924(d), the structure of the statute and the legislative history underlying the forfeiture provision reveals that the forfeiture was intended to be punishment for criminal wrongdoing.

It is the structure of 18 U.S.C. § 924 which primarily reveals the intent of Congress to impose forfeiture under this statute as punishment for crime. The statute is entitled "Penalties", and subsections (a) and (b) of the statute specify criminal fines and imprisonment in the respective amounts of up to $5,000 and five years, and $10,000 and ten years. Subsection

(c), which is now known as § 924(d),33/ then authorizes forfeiture as an additional penalty for the illegal use of firearms, whether that use entails sale without a license, or use in a violent crime. See H.R. No. 1577, reported in [1968] U.S. Code Congressional and Administrative News, 4410, 4423.

The statutes at issue in Coffey and Boyd also provided seriatim for imprisonment, fine and forfeiture, and, largely for this reason, this Court unequivocally characterized the forfeitures at issue in those cases as punishment. Coffey, supra, 116 U.S. at 437; Boyd, supra, 116 U.S. at 617. The structure of § 924 likewise reveals that Congress

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33/ The final version of Pub. L. No. 90-618 redesignated former subsection (c) as (d). The new subsection (c) defines the use or possession of a firearm in the commission of a felony as an additional criminal offense and prescribes an additional term of imprisonment of one to ten years (two to twenty-five years for second and subsequent convictions).

intended this forfeiture to be punishment.34/

The legislative explanation of the Gun Control Act also supports the conclusion that § 924 contains an arsenal of "Penalties" to be imposed as punishment for criminal misconduct under the Act. Section 101 of the Gun Control Act (Pub. L. No. 90-618) contains a rare Congressional proclamation as to the purpose of the legislation:

> The Congress hereby declares that the purpose of this title [which amended this chapter] is to provide support to Federal, State, and local

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34/ The fact that forfeitures under 18 U.S.C. § 924(d) are accomplished via civil in rem proceedings is not dispositive of the nature of the penalty that Congress intended to create under this statute. What is important is Congressional intent with respect to the function of the sanction. United States v. LaFranca, 282 U.S. 568, 575 (1930) (the form of a civil action does not change the punitive nature of the penalty); United States v. Chouteau, 102 U.S. 603, 611 (1880) ("The term 'penalty' involves the idea of punishment and its character is not changed by the mode in which it is inflicted.").

> law enforcement officials in their fight against crime and violence, and it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to . . . any . . . lawful activity.

Pub. L. 90-618, Section 101. See also Cong. Rec., 90th Cong. 2d Sess., July 23, 1968 p. 22773.

The official report of the House of Representatives on the Gun Control Act as a whole also reveals this same broad intent to devise a statute to punish criminals:

> The increasing rate of crime and lawlessness and the growing use of firearms in violent crime clearly attest to a need to strengthen Federal regulation of interstate firearms traffic. . . .
>
> Handguns, rifles, and shotguns have been the chosen means to execute three-quarters of a million people in the United States since 1900. The use of firearms in violent crime continues to increase today. . . . No civilized society can ignore the malignancy which this senseless slaughter reflects.

H.R. No. 1577, 90th Cong. 2d Sess., reported in [1968] U.S. Code

Congressional and Administrative News, 4410, 4412-13.

From this analysis of the punitive purpose of forfeiture under § 924(d), it also follows that insofar as § 924(d) contemplates punishment for crime, it authorizes forfeitures only following conviction. Acquittal constitutes a judicial determination, conclusive and binding, that there was no "violation" of a law specifying a crime upon which to hang a forfeiture of property "used or intended to be used in any violation" of the criminal law.35/

Thus, for the Government now to deprive Respondent of his property, in consequence of a "violation" that has been found to be lacking, not only runs afoul of the Double Jeopardy Clause, because the forfeiture was intended by

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35/ A separate forfeiture proceeding following conviction is not barred

(Footnote continued)

Congress to be punishment, it also is not authorized by the terms of the stat-

(Footnote continued)

by the Double Jeopardy Clause when the forfeiture is authorized as a cumulative penalty, to be imposed in addition to fine and imprisonment. In re Leszynski, 15 Fed. Cas. 397 (Case No. 8,279) (Circuit Court, S.D.N.Y. 1879). Forfeiture as a cumulative penalty also may be imposed following a special verdict by the jury in a criminal proceeding that the property seized was used -- beyond a reasonable doubt -- in the crime charged. See the forfeiture provisions of the Racketeering Influenced and Corrupt Organizations Act of 1961, 18 U.S.C. § 1963, Pub. L. 91-452, 84 Stat. 943, and Federal Rule of Criminal Procedure 31(e).

When the forfeiture is specified by statute as an alternative penalty to imprisonment or fine, however, then the forfeiture is barred equally by acquittal or conviction on the criminal charge; when the Government is offered a choice of penalties, it must be held to that choice, even if the crime which would justify the forfeiture is proved beyond a reasonable doubt in the criminal proceeding. See In re Food Conservation Act, 254 F. 893 (D.C.N.Y. 1918); United States v. One Distillery, 43 F. 846 (D.C. Cal. 1890), aff'd on other grounds, 174 U.S. 149 (1899); United States v. Gates, 25 Fed. Cas. 1263 (No. 15,191) (S.D.N.Y. 1845).

ute, because it is intended to follow conviction.36/

B. The Punitive Purpose and Effect of Forfeiture Under 18 U.S.C. § 924(d) Identify the Penalty as Punishment for Crime.

Prescinding from considerations of express legislative intent, the Mendoza-Martinez factors together provide the clearest proof that the underlying purpose and the effect of forfeitures under 18 U.S.C. § 924(d) is punishment.

36/ Strictly speaking, this construction of 18 U.S.C. §924(d) would obviate the need for this Court to address the constitutional issue presented by this case. However, the question of whether a federal forfeiture statute which exempts those innocent of crime is a criminal or a civil penalty is also raised in another case now before this Court on petition for certiorari. Aponte v. United States, U.S. No. 82-5857, filed, Dec. 7, 1982. In that case, forfeiture was sought following conviction, and the claimant was forced to bear the burden of proof as to the innocence of his property. Amicus represents the Petitioner in that case.

The most salient factor in the Mendoza-Martinez list with respect to this case is whether or not the conduct which justifies the Government in forfeiting Respondent's firearms is itself a crime. In this case, Respondent was charged with, and acquitted of, a criminal violation of the Gun Control Act. The forfeiture at issue here is predicated upon that same alleged, and unproved crime.

Even considered outside its application in this case, Section 924(d) predicates forfeiture only upon a finding of criminal culpability. Section 924(d) authorizes forfeiture only when property is "used or intended to be used in any violation" of the 1968 Gun Control Act. The words "used or intended to be used" here allow the Government to forfeit an entire stock of firearms, even though only a few were ever illegally sold, if the Government can show that the owner intended to sell

the rest illegally as well. The penalty therefore does not reach beyond the realm of criminal misconduct, but is intended to follow in consequence of criminal behavior even in its incipiency.37/

The cases clarify this construction of the statute by emphasizing that forfeiture in the absence of an actual violation, under the "intended use" portion of the statute, requires a manifest intent to violate the law. See United States v. One Assortment of Seven Firearms, 632 F.2d 1276, 1276 (5th Cir. 1980) ("[t]he firearms, to be subject to forfeiture, must be reasonably identified to the [attempted] violation . . . [as] a necessary indicator of intent");

37/ To the extent that anticipated violation qualifies as a criminal attempt, forfeiture of property "intended to be used" in a violation actually will have been used in a violation. See Federal Rule of Criminal Procedure 31(c) (a defendant may be found guilty of a lesser included offense or an attempt to commit the offense or a lesser included offense).

United States v. 1,922 Assorted Firearms and 229,553 Rounds of Assorted Ammunition, 330 F. Supp. 635 (E.D. Mo. 1971) (carelessness, negligence and inadvertence are insufficient to show intended use of firearms in a violation of the Gun Control Act).

Section 924(d) therefore reaches beyond actual violations only to punish provable instances of mens rea.38/ The statute's focus on criminal culpability and moral guilt as justification for the forfeiture thus reveals that forfeiture under § 924(d) is an additional penalty for crime.

The foregoing analysis suggests that, in application, Section 924(d) forfeitures have been construed to re-

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38/ This case is thus unlike One Lot Emerald Stones and One Ring v. United States, 409 U.S. 232, 234 (1972). That case involved a statute which provided that the Government was not required to prove the 'intent' necessary for criminal conviction in order to secure a civil, remedial forfeiture.

quire a 'bad intent' in the commission of a crime. But in fact, the statute by its terms contains an implicit requirement of scienter in justification of forfeiture. The statute provides that "all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms" apply to "forfeitures under the provisions of this chapter." The Internal Revenue Code in turn incorporates the provisions of the customs law with respect to remission and mitigation of forfeiture.39/ See McKeehan v. United States, 438 F.2d 739, 742 n.2 (6th Cir. 1971) (customs law governing remission and mitigation of forfeitures applicable

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39/ Forfeitures of firearms under the Internal Revenue Code are governed by 26 U.S.C. § 5872. Subpart (b) of this statute notes that remission and mitigation of forfeiture is available to the owners of seized property. Subpart (a) of the statute also makes relevant to forfeitures under this statute "all the provi-

(Footnote continued)

to forfeitures under 26 U.S.C. § 5872).

The effect of the customs law remission and mitigation provisions upon the punitive nature of a statutory forfeiture was considered by this Court in United States v. United States Coin and Currency, 401 U.S. 715 (1971) (construing 26 U.S.C. § 7302). In that case, the Court specifically observed that restricting the application of the forfeiture to the guilty -- through the identical incorporation of customs law procedures applicable here -- rendered the forfeiture a punitive sanction:

(Footnote continued)

> sions of internal revenue laws relating to . . . forfeitures of unstamped articles." Sections 7321 through 7328 of Title 26 thus also are relevant to forfeitures under 18 U.S.C. § 924(d), and § 7327 of that Title again provides for remission and mitigation of forfeiture, stating that the applicable provisions of the customs law (19 U.S.C. § 1595 et seq.) shall also govern remission and mitigation of forfeitures under the Internal Revenue Code.

> An express statutory provision permits the innocent owner to prove to the Secretary of the Treasury that the 'forfeiture was incurred without willful negligence or without any intention on the part of the petitioner . . . to violate the law.' . . . It is not to be presumed that the Secretary will not conscientiously fulfill this trust, and the courts have intervened when the innocent petitioner's protests have gone unheeded . . . When the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise.

Id. at 721-22 (emphasis supplied).

Given that forfeitures under 18 U.S.C. § 924(d) are subject to remission and mitigation under the very same statutory provisions found to be so relevant in Coin and Currency, it is manifest that they, also, are intended to punish only "those who are significantly involved in criminal enterprise."40/ See McKeehan, supra, at 743-44 (owner devoid

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40/ Compare Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (statute authorizing forfeiture did not restrict the penalty to the guilty).

of mens rea was unconstitutionally deprived of firearms under 18 U.S.C. § 924(d) without just compensation).41/ Thus, to the extent that forfeitures under Section § 924(d) are not intended to be visited upon those who are innocent of involvement in the underlying crime, the statute encompasses an implicit requirement of scienter.42/

41/ Accord United States v. One Assortment of Seven Firearms, supra. United States v. 1,922 Assorted Firearms, supra. But see, United States v. 16,179 Moslo Italian .22 Caliber Winler Convertible Starter Guns, 443 F.2d 463, 466 (2d Cir. 1971), cert. den., 404 U.S. 983 (1971) (refusing to find a scienter requirement in the plain words of § 924(d), but not considering the effect of the remission and mitigation provisions).

42/ This scienter requirement is even clearer in 21 U.S.C. § 881(a)(6), which authorizes forfeitures for the illegal use of property in accordance with these same customs statutes, but which also contains an express exculpatory clause for persons innocent of criminal involvement. This statute is the subject of the case Aponte v. United States, 689 F.2d 10 (2d Cir. 1982), now pending before this Court on a Petition for Certiorari. No. 82-5857, filed, Dec. 7, 1982.

The conclusion that forfeitures under § 924(d) punish crime is buttressed by the fact that such forfeitures serve the purposes of retribution and deterrence. That forfeitures under § 924(d) further these purposes is evidenced by the legislative materials discussed above. Moreover, cases like Boyd v. United States, supra, and United States v. United States Coin and Currency, 401 U.S. 71, 718 (1971), illustrate that, as a class, forfeitures occasioned by criminal misconduct further these punitive goals.

In Coin and Currency, this Court expressly noted that "there is no difference . between a man who 'forfeits' $8,674 because of [illegal use] and a man who pays a 'criminal fine' of $8,674 as a result of the same course of conduct". See also One 1938 Plymonth Sedan v. Pennsylvania, 380 U.S. 693, 700 (the object of such a forfeiture, "like a criminal proceeding, is to

penalize for the commission of an offense against the law").

In contrast to punitive forfeitures like that authorized by § 924(d), remedial, civil sanctions function as compensatory measures. For example, in Helvering v. Mitchell, 303 U.S. 391, 401 (1937), the Court held that a penalty of 50% of a tax deficiency was remedial because it was intended as government compensation and "as a safeguard for the protection of the revenue." Similarly, in One Lot Stones, supra, 409 U.S. at 236, the forfeiture involved was not conditioned upon a crime, and was intended to be a remedial measure to safeguard the government fisc.43/ Moreover, the Court in

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43/ See also, United States v. Ward, 448 U.S. 242, 254 (1980) (distinguishing forfeitures predicated upon crimes from penalties "analogous to traditional civil damages"); Rex Trailer Co., Inc. v. United States, 350 U.S. 148, 153 (1956) (provision for fine "comparable to the recovery under

(Footnote continued)

One Lot Stones specifically distinguished remedial statutes from statutes which provide for "forfeiture of a man's property by reason of offenses committed by him." Id.

Forfeitures of firearms under 18 U.S.C. § 924(d) are not remedial as reimbursement or compensation to the government.44/ Furthermore, the struc-

(Footnote continued)

liquidated damages provisions which fix compensation for anticipated loss"); United States ex rel. Marcus v. Hess, 317 U.S. 537, 549 (1943) (fine prescribed "will no more than afford the government complete indemnity for the injuries done it"); Stone v. United States, 167 U.S. 178, 188 (1897)(the Government here "only seeks in its capacity as owner of property, illegally converted, to recover its value").

44/ This Court observed in United States v. Ward, 448 U.S. 242, 254 (1980) that the forfeiture in Boyd v. United States, 116 U.S. 616 (1885), which was occasioned only by reason of offense against the criminal law was "a penalty that had absolutely no correlation to any damages sustained by society or to the cost of enforcing the law." Forfeiture under § 924(d) likewise is predicated solely upon criminal wrongdoing and, unlike the statute at issue in Ward, it has no remedial function.

ture of the statute, providing sequentially for imprisonment, fine and forfeiture, illustrates that the forfeiture of firearms as a result of their alleged illegal use is actually a measure directed against the owner to punish him for the underlying crime and to deter him from future such conduct.

Forfeiture under § 924 is not only designed to punish, it also operates as punishment, because it is an "affirmative disability or restraint." The Supreme Court in Mendoza-Martinez cited three cases for the proposition that the imposition of an "affirmative disability or restraint" is characteristic of a criminal penalty. 372 U.S. at 168. Taken together, these cases establish that an affirmative disability or restraint is a detriment which is effected by positive governmental action taken in order to deprive the individual

of property or liberty.45/

With respect to forfeiture under 18 U.S.C. § 924(d), the seizure and condemnation of a man's property because the property is involved in the illegal conduct of its owner undoubtedly constitutes direct and affirmative action taken by the Government against the guilty person for the purpose of punishing that person. Such forfeiture is not merely the denial of a benefit allocated according to governmental discretion; rather, it is a physical taking of

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45/ Flemming v. Nestor, 363 U.S. 603, 617 (1960) (statutory termination of social security benefits not punitive and not a deprivation of accrued property rights); United States v. Lovett, 328 U.S. 303, 315 (1945) (statute denying payment of earned salary to three named government employees was punishment); Ex parte Garland, 4 Wall. (71 U.S.) 333, 377 (1867) (oath required of attorneys seeking to practice before the federal courts was punishment). Cf., Helvering v. Mitchell, 303 U.S. 391, 399 (1938) ("One [remedial sanction] which is characteristically free of the punitive criminal element is the revocation of a privilege voluntarily granted").

property belonging to the claimant. This is precisely the meaning of "affirmative disability."

Moreover, forfeitures historically have been regarded as punishment. The law of forfeiture has dual historical roots, which predicate forfeiture upon differing theories of guilt, but which both link the sanction of forfeiture to the goal of punishment for wrongdoing.

The historical criminal basis for forfeiture was the idea that rights to property accrue to individuals only through the covenants of society, as embodied in the laws of the state. Violation of those laws effectively repudiates the social contract which enables the individual to own property, and so the property may be forfeited. 1 W. Blackstone, Commentaries.46/

46/ Thus, under English common law, an in personam forfeiture proceeding

(Footnote continued)

The alternate root for the forfeiture sanction is the archaic doctrine of deodands. Under that ancient and superstitious theory, instruments of harm were themselves considered wrongdoers. The idea of retribution suffuses this fiction, however, because the purpose of the ascription of guilt was to wreak vengeance upon the thing, as if it were sentient and could appreciate punishment. O. Holmes, The Common Law, Lecture 1 at 10, 34 (1881).47/

(Footnote continued)

could be used to effect forfeiture of a felon's real and personal property once the offender was convicted. See The Palmyra, 12 Wheat. (25 U.S.) 1, 14 (1827).

47/ Although the doctrine of deodands has been soundly, and rightfully, denounced on many occasions, it still sometimes confuses the issue of punishment in the context of in rem forfeitures. Compare the following cases: Boyd, supra, 116 U.S. at 637 (rejecting the legal fiction and recognizing that forfeitures of property for offenses against the law are really punishments directed against the owners); Various Items

(Footnote continued)

Finally, there is no remedial purpose alternatively assignable to forfeitures under 18 U.S.C. § 924(d). The Government is incorrect in asserting that forfeitures of firearms have a non-punitive purpose, viz., the prevention of illegal commerce in guns. (Gov't Br. at 33.)

First, this is not a case where the forfeiture is preventative because it removes contraband from circulation. Simple ownership of registered guns is not illegal, nor is sale under proper

(Footnote continued)

of Personal Property v. United States, 282 U.S. 577, 581 (1931) (resorting to the legal fiction that property can be "held guilty and condemned as though it were conscious instead of inanimate and insentient"); United States v. United States Coin and Currency, 401 U.S. 715, 720-21 (1971) (noting Blackstone's observation that the legal fiction of the animation of property is "based upon a 'superstition' inherited from the 'blind days' of feudalism."); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683 (1974) (construing a statutory forfeiture as directed against the thing as offender).

license. Forfeiture under § 924(d) is directed uniquely against guns that are sold illegally. This goal of "prevention" thus assumes that Respondent will sell his firearms illegally in the future and imputes to Respondent the moral guilt and knowing intent which is the basic foundation for all justifications of punishment.48/

Consequently, this sort of "prevention" is not an "alternative" purpose to punishment, because such prevention is no more than "incapacitation" with respect to future criminal conduct. Such incapacitation is an acknowledged rationale for criminal punishment.49/ As this Court noted in its construction of the Gun Control Act in Huddleston v. United States, 415 U.S. 814 (1979),

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48/ See H.L.A. Hart, Punishment and Responsibility (1968), especially the included essay, Intention and Punishment, at pp. 113-135.

49/ H. L. Packer, The Limits of Criminal Sanction (1968) pp. 48-53.

Congress achieved its purpose to deprive individuals of firearms "whose possession of them would be contrary to the public interest" (id. at 825) by the instrument of "criminal statutes." Id. at 831.

Second, whatever the character of this purported purpose, forfeiture without just compensation, or without alternatives, such as the option to post a bond conditioned against illegal use, 50/ is not consistent with an intent to "regulate" rather than punish. At the very least, the sanction is excessive if justified on the basis of "prevention" rather than punishment. The last of the Mendoza-Martinez factors thus indicate that there really is no distinct alternative purpose to punishment assignable to forfeiture under 18 U.S.C. § 924(d), and that, in any event,

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50/ Cf. Murphy v. United States, 272 U.S. 630, 632 (1926) (preventative goal evidenced by alternative of a bond).

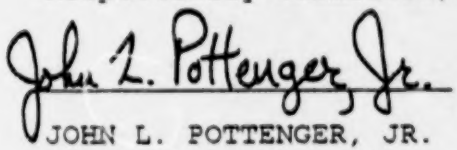
the penalty is excessive in relation to the proposed alternative function of prevention. All of the Mendoza-Martinez factors thus point to the punitive purpose and effect of forfeiture under 18 U.S.C. § 924(d).

In sum, this Court's method of statutory construction for characterizing a sanction as punitive or remedial reveals that a forefeiture of firearms under the Gun Control Act is punishment for criminal wrongdoing. Consequently, the Double Jeopardy Clause forbids the Government to take a second shot at punishing Respondent via forfeiture after he has been acquitted on the underlying criminal charges.

CONCLUSION

The judgment of the en banc court of appeals should be affirmed.

Respectfully submitted,



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